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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KESTON DARNELL BARNES,

Defendant and Appellant.

A103560

(Del Norte County Super. Ct.
No. CR-PB-03-5038)

Defendant Keston Darnell Barnes appeals the judgment entered against him after a jury found him guilty of battery by an inmate on a non-inmate. (Pen. Code,¹ § 4501.5.) He contends that the trial court erred in denying his request to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)), and that he received ineffective assistance of counsel. We affirm.

I. BACKGROUND

Defendant was an inmate at Pelican Bay State Prison on July 25, 2002. On that date, he had a disciplinary hearing before Roger Schaufel, a deputy commissioner for the Board of Prison Terms. Defendant was seated, in waist chains and leg irons. At the end of the hearing, when Schaufel decided to extend defendant's time in custody, defendant appeared to become angry. As correctional officers approached him, defendant stood up, grabbed the end of the large table that was between him and Schaufel, and tilted it up so

¹ All statutory references are to the Penal Code.

that it hit Schaufel's lap. Several objects that were on the table fell to the floor. Correctional officers grabbed and subdued defendant, who struggled with them and tried to bite one officer. One of the officers injured his knee, and later required two surgeries. An officer scraped his shin and injured his back in the incident, and another scratched his shin.

Defendant testified in his own defense that he had scoliosis, which caused muscle spasms in his back. According to defendant, when he was getting up at the end of the hearing, he had a painful muscle spasm, and he grabbed the table to keep from falling down. When he saw medical personnel that day, defendant did not complain of back spasms.

Defendant was charged with battery on Schaufel pursuant to section 4501.5 (battery by inmate upon non-inmate). Two prior convictions of assault with great bodily injury were alleged as strikes (§§ 667, subds. (b)-(i), 1170.12), and one prior prison term as an enhancement (§ 667.5, subd. (b)). A jury found defendant guilty of battery by an inmate on a non-inmate. (§ 4501.5.) Defendant waived his right to a jury trial on the special allegations, and the trial court found them to be true. The trial court sentenced defendant to a total of nine years in prison. This timely appeal ensued.

II. DISCUSSION

A. Denial of *Faretta* Motion

Defendant moved to substitute his appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) on June 5, 2003. He told the trial court his attorney had refused to do several things defendant had requested. Those things included filing a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*),² arranging to have the table from the prison hearing room brought into court, having the

² *Pitchess* concluded that “a criminal defendant has a limited right to discovery of peace officer personnel records in order to ensure ‘a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.’ ” (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037-1038, fn. 3, quoting *Pitchess*, *supra*, 11 Cal.3d at p. 535.)

room videotaped, and obtaining his medical file. After hearing defense counsel's response, the trial court denied the *Marsden* motion.

Defendant then stated, "Well, Your Honor, I'll go pro per, then. I'll file my case myself. I do not want this lawyer representing me because he's not going to give me an adequate trial. And I want to have someone represent me in the right way." The trial court then questioned defendant regarding his understanding of the responsibilities and risks of self-representation, and defendant said he wished to represent himself. The following exchange then took place: "The Court: Now, you understand that the trial is set to start on June the 16th, which is only a little more than a week away. And that at that time it's going to be necessary for you to go forward. Are you going to be prepared to do that? [¶] Defendant Barnes: No, I'm not prepared to do that. [¶] The Court: Well, if — if you are not ready to represent yourself then first of all that raises the question whether we should at this time allow you to substitute counsel out and allow you to represent yourself. If you are not going to be ready on June 16th when would you be ready? [¶] Defendant Barnes: May I ask the court in the beginning to appoint an investigator to do things I need done because I can't do the stuff I need done confined in prison. [¶] The Court: So you have no knowledge how soon you would be ready to proceed to trial? [¶] Defendant Barnes: No, because I need to get a private investigator. If you grant a private investigator — the private investigator have [*sic*] to come to the institution to sit down and talk to me. I will explained [*sic*] what I need him to do. And then when I get done with that — whenever I get this stuff back from the private investigator — [¶] The Court: Do you know how long it will be before you will be ready for trial? [¶] Defendant Barnes: No, I don't. I need access to the law library." The prosecutor objected, pointing out that defendant had a release date, and suggesting the request for self-representation was made for the purpose of delay. Defense counsel informed the court that defendant had "some psychiatric issues," for which he took two psychotropic medications daily. The trial court denied the request for self-representation because the defendant would not be able to proceed to trial on the scheduled date, and was not able to state when he would be ready if he represented himself.

Defendant contends the trial court erred in denying his *Faretta* motion. “A trial court must grant a defendant’s request for self-representation if the defendant knowingly and intelligently makes an unequivocal and timely request after having been apprised of its dangers. [Citations.] *Faretta* error is reversible per se. [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 97-98.) However, “[a] motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.” (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) Because of the importance of the constitutional right to the effective assistance of counsel, courts are instructed to “draw every inference against supposing that the defendant wishes to waive the right to counsel.” (*Ibid.*, citing *Brewer v. Williams* (1977) 430 U.S. 387, 404; see also *People v. Danks* (2004) 32 Cal.4th 269, 295.)

The record here supports the trial court’s decision to deny defendant’s motion. The motion was apparently made in response to defendant’s frustration at the denial of his *Marsden* motion. More importantly, not only would defendant have been unprepared for trial on the scheduled date, but he was unable to inform the court when he would have been able to go to trial if allowed to represent himself. Defendant insisted he would need a private investigator to “do things [he] need[ed] done,” and only after receiving the investigator’s work product in the indefinite future would defendant be able to provide an estimated trial date. Given the straightforward nature of this case, involving a brief incident with several eyewitnesses, the appointment of a private investigator would serve little if any purpose besides delay. Further, the district attorney made known his understanding that defendant had a release date and expressed concern about the trial’s being delayed beyond that date. On these facts, the trial court did not err.

B. Ineffective Assistance of Counsel

Defendant contends he was deprived of effective assistance of counsel when his attorney failed to object to questioning or move to strike evidence.

1. Deputy Commissioner Schaufel's Testimony

Deputy Commissioner Schaufel testified that in the incident report he prepared, he stated that defendant “attacked me and violently resisted four custody officers” and that he recommended prosecution and a parole violation hearing for assault with intent to do bodily injury. Schaufel also testified that he had never had an inmate try to hurt him before, and that as a result of defendant’s combative reaction and the way he so suddenly stood up and upended the table, Schaufel felt the incident was a personal attack on him. Defendant contends this constituted improper opinion testimony because it indicated Schaufel thought defendant acted purposely and that he was guilty of assault.

2. Testimony About Officers' Injuries

Three correctional officers testified that they suffered injuries when they attempted to subdue defendant. These injuries included a back injury that required the officer take three months off work, and a knee injury that required two surgeries. Defendant contends the testimony regarding the long-term effects of injuries to the officers, who were not the victims of the crime with which defendant was charged, was inadmissible.

3. Disagreement with Testimony of Another Witness

The prosecutor asked defendant whether he recalled the testimony of one witness, Officer Rider. Defendant replied that he did not remember all of it. The following exchange then occurred: “Q: Okay. Well, is there any part of anything that he said that you disagree with? [¶] A: Well, you had to read all of his — you would have to read back all — everything he said. [¶] Q: But there’s nothing that stands out in your mind as you sit there under oath that you disagree with without — having it read back; is that correct? [¶] A: No. [¶] Q: Okay. Well, if a back spasm caused you to — caused you to tip over the table, why is it that Officer Rider had to stop you from trying to bite people? [¶] A: I believe that was not in no reports [*sic*] that I attempted to bite anybody. If you would read Rider’s report, there’s nothing in there indicating I tried to bite anybody.” Defendant contends that in this line of questioning, the prosecutor improperly asked him to vouch for the credibility of another witness.

On appeal, defendant contends his counsel's failure to object to this testimony constituted ineffective assistance. "Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541 (*Dennis*)). "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.]" (*Id.* at p. 541.) "Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions. [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) Prejudice is established when counsel's performance " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Ibid.*, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Prejudice must be proved as a demonstrable reality, not simply speculation. (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

We need not consider whether defense counsel acted improperly in failing to object to the challenged testimony, because defendant has failed to show his counsel's actions prejudiced him. Deputy Commissioner Schaufel's testimony that he felt the incident was a personal attack on him, even if improper, added little to the testimony of Schaufel and several eyewitnesses that defendant became upset, grabbed the table, tilted it so that it hit Schaufel's lap, struggled with the correctional officers, and tried to bite one of them. Similarly, the correctional officers' testimony about the effects of their injuries added little to the evidence that defendant struggled with them as they tried to subdue him immediately after he pushed the table onto Schaufel. Nor was this testimony

the sort that was likely to inflame the jury against the defendant. (Compare *People v. Johnson* (Ill.Ct.App. 1979) 394 N.E.2d 919, 920, 922-923 [“severely prejudicial” evidence that defendant fired shotgun through closed tavern door after leaving the premises following an armed robbery, paralyzing victim, improperly admitted].) Finally, we see no reason to conclude that defendant was prejudiced by the prosecutor’s question regarding whether he disagreed with any of Officer Rider’s testimony. The exchange contains no implication that defendant agreed with Officer Rider’s testimony; in fact, defendant indicated he did not recall all of the testimony, and pointed out that Officer Rider’s original report made no mention that he had tried to bite anyone.

The evidence against defendant was strong, and included the testimony of several eyewitnesses. Defendant has not shown a reasonable probability he would have obtained a more favorable result in the absence of the challenged testimony. (See *Dennis, supra*, 17 Cal.4th at pp. 540-541.) Accordingly, we reject his contention that he received ineffective assistance of counsel.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

KAY, P.J.

SEPULVEDA, J.